

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

76-5015

United States Court of Appeals

For the Second Circuit.

IN THE MATTER

OF

ROBERT K. GOLDEN,

Bankrupt.

ROBERT K. GOLDEN,

Plaintiff-Appellant,

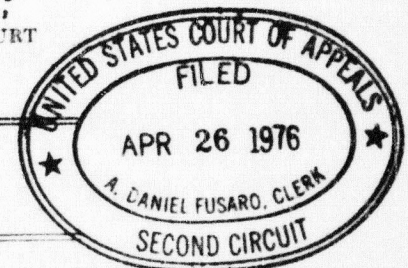
against

RENEE GOLDEN,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX



GEORGE FRIEDMAN

Attorney for Appellant

295 Madison Avenue

New York, N. Y. 10017

MU 5-1264

GELBWAKS & POLLACK

Attorney for Appellee

299 Broadway

New York, N. Y. 10007

732-2540

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 782-6978—1976

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PAGINATION AS IN ORIGINAL COPY

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UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

-----X

IN THE MATTER
of
ROBERT K. GOLDEN,
Bankrupt.

-----X

ROBERT K. GOLDEN,
Plaintiff-Appellant,
-against-
RENEE GOLDEN,
Defendant-Appellee.

-----X

DOCKET ENTRIES.

Date	Proceedings
12/31/74	Filed Petition, Schedules and Statement of Affairs. Referred to Bank. Judge Babitt.
8/29/75	Filed NOTICE OF APPEAL of Robert K. Golden, appealing to the District Court from the Order of Hon. Roy Babitt Bankruptcy Jdg. dated June 3, 1975 dismissing the complaint herein and concluding ... RET: Tuesday October 21, 1975 in room 506 at 10:30 A.M. f.

DOCKET ENTRIES

Date	Proceedings
8/29/75	Filed APPELLANT'S DESIGNATION and STATEMENT of ISSUES. f/
10/21/75	Filed STIPULATION, that the Appeal in this matter is adjourned to 11/6/75 and appellant's time to serve its brief is extended to 10/22/75. So ordered Pierce, J. dated 10/21/75. f.
2/26/76	Filed OPINION #43940. The order of the Bkcy. Judge is affirmed in all respects. So ordered Weinfeld J. 2/25/76: Copy to Bkcy. Judge, m/n: George Friedman, Esq. 295 Madison Ave. N.Y. 10017, Gelbwaks & Pollack, Esqs. 299 Broadway N.Y. 10007, & Judge Babitt U.S. Court-house 40 Centre St. Rm 202 f.
3/5/76	Filed ORDER TO SHOW CAUSE, why an order should not be made herein staying and enjoining them from proceedings, etc. RET: 3/9/76 at 10:00 A.M. So ordered Pollack, J. dated 3/5/76. f.
3/5/76	Filed NOTICE OF APPEAL, to USCA by Robert K. Golden from the Opinion-Order of Weinfeld, J. dated 2/26/76. m/n/ f.

COMPLAINT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter

of

ROBERT K. GOLDEN,

Bankrupt.

In Bankruptcy No.
74 B 1881

The bankrupt, by GEORGE FRIEDMAN, ESQ., his attorney, for his complaint herein, alleges:

1. That he is the bankrupt herein having duly filed a voluntary petition in bankruptcy in this Court on December 31, 1974.
2. That one of the creditors scheduled by him in Schedule A-3 is Renee Golden, 220 S. Gale Drive, Beverly Hills, California, in the amount of \$35,086.00.
3. That said creditor is the bankrupt's former wife.
4. That said debt arises pursuant to an Order and Judgment of the Family Court of the State of New York, Kings County, dated December 17, 1974, in a proceeding entitled "Renee Golden, Petitioner, against Robert Golden, Respondent" and bearing docket number F 2997/63.
5. That said Judgment results from the following circumstances:
 - a. The bankrupt and creditor entered into an agreement dated March 1, 1968 whereby the bankrupt acknowledged past due child support in the amount of \$12,126.00;

COMPLAINT

b. Such sum was to be paid by alternative methods, at the bankrupt's option, one of which was to create a trust of mutual funds for the benefit of the child, Philip A. Golden;

c. Renee Golden, the creditor herein, waived any right to past, present or future alimony;

d. Child support was to continue at graduated amounts, depending on certain circumstances, at the rate of \$220.00, \$260.00 or \$300.00 per month.

e. In the event of any default, by the bankrupt, of ten days duration, a penalty of \$5.00 per day was to be imposed and in the event of any default by the bankrupt, of thirty days duration, a further penalty, designated as revived alimony, in the amount of \$35.00 per week was to be imposed.

6. That the bankrupt substantially complied with the aforesaid agreement dated March 1, 1968 in that two trusts were created by him for the benefit of Philip A. Golden as beneficiary and which, together with certain other payments, amounted to \$12,126.00.

7. That the said trusts were created during the year 1969.

8. That the creditor Renee Golden was aware of the existence of said trusts from the time of their creation through the years 1970, 1971, 1972 and 1973.

9. That in or about September, 1972, the bankrupt ceased making payments on account of current support for Philip A. Golden directly to Renee Golden.

COMPLAINT

10. That in or about March, 1973, Renee Golden, the creditor, brought on proceedings for certain relief in the Family Court of the State of New York, Kings County, which culminated in the Order and Judgment of December 17, 1974.

11. That the aforesaid Judgment in the amount of \$35,086.00 is compromised of the following items:

a. \$12,126.00 being the amount originally acknowledged as due by the parties pursuant to their agreement dated March 1, 1968;

b. \$8,960.00 representing a penalty of \$5.00 per day for each day from September 1, 1969 pursuant to a default provision of the agreement dated March 1, 1968;

c. \$8,960.00 representing a penalty of \$35.00 per week from September 1, 1969 pursuant to a default provision of the agreement dated March 1, 1968;

d. \$5,040.00 as actual arrears of child support at the rate of \$260.00 for 19 1/2 months accruing subsequent to September, 1972.

12. That during the period of time subsequent to September, 1972, the bankrupt expended the sum of \$1,600.00 directly for support of the infant Philip A. Golden.

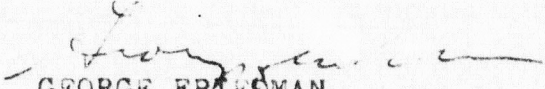
13. That by virtue of the foregoing, so much of the Order and Judgment of the Family Court of the State of New York, Kings County dated December 17, 1974 in favor of Renee Golden as amounts to \$31,646.00 does not represent a debt for alimony or

COMPLAINT

maintenance or support of wife or child and is dischargeable pursuant to Section 17 of the Bankruptcy Act.

WHEREFORE, the bankrupt respectfully prays that a judgment be granted declaring so much of the aforesaid Order and Judgment dated December 17, 1974 in favor of Renee Golden as amounts to \$31,646.00 to be dischargeable and for such other and further relief as to this Court may seem proper.

Dated: New York, New York
January 2, 1974


GEORGE FRIEDMAN
Attorney for Bankrupt
Office & P.O. Address
295 Madison Avenue
New York, New York 10017

ANSWER.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -x
:
In the Matter
:
of
:
ROBERT K. GOLDEN,
:
Bankrupt.
----- -x

In Bankruptcy No.
74 B 1881
ANSWER

RENÉE GOLDEN, by her attorneys, GELBWAKS and POLLACK,
Esqs., for her Answer to the complaint herein, alleges:

1. Denies knowledge or information sufficient to form a belief as to each and every allegation of the complaint herein numbered "1", "2", "4" and "12".

2. Denies each and every allegation contained in paragraph "5" of the complaint, except admits those allegations contained in subparagraphs "a" and "d" of the aforesaid paragraph "5" of the complaint.

3. Denies each and every allegation contained in paragraphs "6", "7", "8", "11" and "13" of the complaint herein.

AS AND FOR AN AFFIRMATIVE DEFENSE

4. That all of the aforementioned \$35,086.00 due by ROBERT K. GOLDEN to RENÉE GOLDEN is computed as follows, pursuant to the attached computation of arrears submitted to the Presiding

ANSWER

Judge, Family Court of the State of New York, County of Kings, in the trial of the matter between RENEE GOLDEN, Petitioner, against ROBERT GOLDEN, Respondent, Docket No. F 2997/1963, a copy of which documents are attached hereto as Exhibit "A".

WHEREFORE, RENEE GOLDEN demands that the within complaint of ROBERT K. GOLDEN, be dismissed in its entirety, and for such other and further relief as to this Court may seem just and proper in the premises.

Yours, etc.

GELBWAKE and POLLACK
Attorneys for RENEE GOLDEN
Office and P. O. Address
299 Broadway
New York, N. Y. 10007
212-732-2540

To:

GEORGE FRIEDMAN
Attorney for Bankrupt
Office & P.O. Address
295 Madison Avenue
New York, N. Y. 10017
212-685-1264

Clerk, United States District Court
Southern District of New York

EXHIBIT A, ANNEXED TO ANSWER--COMPUTATION OF ARREARS.

Matter of Renee Golden

v. Robert K. Golden

Family Court, County of Kings

Docket No. F2997/63

COMPUTATION OF ARREARS

On March 1, 1968 the parties herein entered into an Agreement cancelling and terminating a prior Agreement of Separation between them which bore date February 3, 1961. The said Agreement of March 1, 1968 was incorporated by reference into an order of this Court made by the Hon. Juvenal Marchisio on March 14, 1968 which, among other things, provided:

"ORDERED, that the agreement between the parties made as of March 1, 1968 be filed with this order, and the parties are directed to comply with the same."

EXHIBIT A, ANNEXED TO ANSWER

Annexed hereto as Exhibits "A" and "B", respectively, are copies of said Agreement dated March 1, 1968 and said Order of the Hon. Juvenal Marchisio dated March 14, 1968.

Pursuant to said Agreement and Order the arrears of support due the petitioner (Renee Golden) and the parties' son (Philip Andrew Golden) are determined as follows:

For the Petitioner:

- | | |
|--|------------------|
| 1. Two (2) Judgments in the respective sums of \$2,839.75 and \$8,586.00 as set forth at page 1 of the Agreement dated March 1, 1968. | \$13,126.00 |
| Less: The sum of \$1,000.00 paid by the Respondent pursuant to paragraph "THIRD" of the Agreement dated March 1, 1968 | <u>-1,000.00</u> |
| 2. Pursuant to Agreement and Order (see paragraph "FOURTH" B, page 4 of Exhibit "A") and (last decretal paragraph of Exhibit "B"). | 12,126.00 |
| 3. Support for the period September 1, 1969 to March 19, 1974 at the rate of \$35.00 per week (see paragraph "FOURTH", D. 5.b., page 7 of Exhibit "A") and (last decretal paragraph of Exhibit "B"). | 8,395.00 |

EXHIBIT A, ANNEXED TO ANSWER

- | | |
|---|--------------------------------|
| 4. Support for the period September 1, 1969 to March 19, 1974 at the rate of \$5.00 per day (see paragraph "FOURTH", D. 4., pages 6-7 of Exhibit "A") and (last decretal paragraph of Exhibit "B"). | 8,300.00 |
| 5. Payment to be made pursuant to paragraph "FOURTH", B. 1., page 4 of Exhibit "A" and (last decretal paragraph of Exhibit "B"). | <u>1,200.00</u>
\$30,021.00 |

LESS:

Payments made by Respondent during the period September 1, 1968 to August 1, 1969 (see paragraph "FOURTH", Section B. 1)	<u>1,200.00</u>
--	-----------------

Arrears due Petitioner:	28,821.00
-------------------------	-----------

For The Parties' Son (Philip Andrew Golden):

- | | |
|---|---------------------|
| 1. For the 19 month period September 1, 1972 to March 1, 1974 at the rate of \$260.00 per month | |
| Arrears due petitioner for support of son | <u>4,940.00</u> |
| Aggregate support due Petitioner and parties' son | <u>\$33,761.00*</u> |

*With interest to be computed at the rate of 6% per annum.

EXHIBIT A, ANNEXED TO ANSWER

Matter of Renee Golden

vs.

Robert K. Golden

Family Court, County of Kings
Docket No. F 2997/63

SUPPELEMENTAL COMPUTATION
OF ARREARS

The computation of arrears due petitioner is
herewith brought to current date to reflect the arrears ac-
cruing since March 19, 1974:

1. March 19, 1974 to July 23, 1974 - a period of 19 weeks at the rate of \$35.00 per week	665.00
2. March 19, 1974 to July 29, 1974 - a period of 132 days at the rate of \$5.00 per day	<u>660.00</u>
Additional arrears due Petitioner	<u>\$1,325.00</u>

EXHIBIT A, ANNEXED TO COMPUTATION OF ARREARS--ORDER.

FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK : COUNTY OF KINGS

-----X

In the Matter of a Proceeding
for Support under Article 4 of
the Family Court Act

:
Docket No. F-2997-63K

HENSE GOLDEN, mother o/b/o
Philip,

: ORDER

Petitioner,

-against-

ROBERT K. GOLDEN,

Respondent.

-----X

Upon the agreement between the petitioner and respondent herein made as of March 1st, 1968, and upon all the papers and proceedings heretofore had herein,

Now, upon motion of LAYTON, NIEDERGANG & WISE, attorneys for the petitioner, it is hereby

ORDERED, that the respondent be no longer in contempt of this Court and the prior findings of contempt against him be and the same hereby are vacated; and it is further

EXHIBIT A, ANNEXED TO COMPUTATION OF ARREARS

ORDERED, that the outstanding warrant for the arrest of the respondent dated August 26th, 1964 and currently extended to March 28th, 1968, be and the same hereby is vacated; and it is further

ORDERED, that the order of this Court of June 18th, 1964 requiring the respondent to pay support for the child Philip, of \$50.00 per week be and the same hereby is continued, and the respondent is directed to pay the same directly to the petitioner, along with payments on account of arrears as specified in the agreement between the parties made as of March 1st, 1968, and the petitioner is directed to notify the Court in May, 1969 and each May thereafter as to payments received by her from the respondent to the date of such notification; and it is further

BEST COPY AVAILABLE

EXHIBIT A, ANNEXED TO COMPUTATION OF ARREARS

ORDERED, that the agreement between the parties made as of March 1st, 1968 be filed with this order, and the parties are directed to comply with the same.

Dated: Brooklyn, New York

February , 1968

MAR 14 1968

E N T E R

BY JUVENAL MARCHISIO
J.F.C.

Consented to:

Stephen A. Wise
Stephen A. Wise,
Attorney for Petitioner

Robert K. Golden
Robert K. Golden,
Respondent, Pro-se

THIS IS TO CERTIFY THAT THIS IS A
TRUE AND CORRECT COPY OF THE
ORIGINAL FILED IN THE OFFICE OF THE
CLERK OF THE COURT OF THE CITY OF
BROOKLYN, NEW YORK.

James J. Keefe
CLERK OF COURT
FILED - 11 - 1-8

EXHIBIT B, ANNEXED TO COMPUTATION OF ARREARS--
PLAINTIFF'S EXHIBIT 1, MAY 1, 1975.

AGREEMENT made as of the 1st day of March, 1968
between Robert K. Golden (hereinafter referred to as the Father)
and Renee W. Golden (hereinafter referred to as the Mother):

W I T N E S S E T H :

WHEREAS, the Father and the Mother are the parents of
Philip Andrew Golden (born June 3, 1958), are separated pursuant
to a separation agreement dated February 3, 1961, and are
divorced by a decree entered on February 16, 1961, in Marion
County, Alabama, which decree incorporated said separation agree-
ment by reference but left the same surviving and without merger
therein; and

WHEREAS, the Father has certain judgments outstanding
against him entered October 13, 1967, to wit:

\$2,839.75 in favor of the Mother as alimony,
and \$300.00 in favor of Layton, Niedergang &
Wise as counsel fees (both in the Supreme Court,
Kings County, Index No. 163/1966); and

\$8,586.00 in favor of the Mother for
arrears in the support of Philip accumulated at
the rate of \$50.00 per week plus interest, and
\$752.47 in favor of Stephen A. Wise as counsel
fees (both in the Family Court, Kings County,
Docket No. F2997/1963); and

EXHIBIT B, ANNEXED TO COMPUTATION OF ARREARS

WHEREAS, there is outstanding in said Family Court proceeding a warrant for the arrest of the Father, dated August 26, 1964 and currently extended to March 28, 1968; and

WHEREAS, in the twenty weeks since the entry of said judgments additional amounts have become due in said action and proceeding as of the date of this agreement, to wit, \$700.00 as alimony in the Supreme Court and \$1,000.00 as child support in the Family Court; and

WHEREAS, the parties are desirous of resolving their various disputes and providing for the support of Philip.

NOW, THEREFORE, in consideration of the mutual promises hereinafter set forth, it is agreed as follows:

FIRST: An order may be entered in the Family Court, Kings County (Docket No. F2997/63), and the Mother's attorney shall promptly apply therefor without further notice to the Father:

A. Finding the Father to be no longer in contempt of the Court;

EXHIBIT B, ANNEXED TO COMPUTATION OF ARREARS

B. Vacating the outstanding warrant for the arrest of the Father, dated August 26, 1964;

C. Continuing the order of June 18, 1964 of support for Philip at \$50.00 per week, with the Father to pay the same directly to the Mother along with payments on account of arrears as specified in this agreement, and with the Mother to notify the Court in May, 1969 and each May thereafter as to payments received by her from the Father to the date of such notification; and

D. Directing that this agreement be filed.

SECOND: The separation agreement between the parties dated February 3, 1961 is hereby cancelled.

THIRD: The Father has, simultaneously with the execution hereof, paid the Mother \$500.00, and he agrees to pay her \$100.00 additional on the first day of each month hereafter for five months, making an additional total over said period of \$500.00. The Mother cancels and waives all claims against the Father for past and future alimony, except to the extent hereinafter specified that the same may be revived either

EXHIBIT B, ANNEXED TO COMPUTATION OF ARREARS

by the Father's failure to make the support payments for Philip hereinafter provided or by the Father's bankruptcy or assignment for the benefit of creditors.

Until the Mother dies or remarries, the Father shall continue to maintain his National Service Life Insurance policy in the full amount of \$10,000.00, without loan or other incumbrance, for her benefit and payable to her in a lump sum, after which the Father shall maintain said policy for Philip's benefit. The Father shall promptly obtain from the Veteran's Administration and provide the Mother with a statement showing the policy to be unencumbered and the beneficiaries to be as thus specified. The Mother may hereafter make such inquiries of the Veteran's Administration as she may deem fit from time to time to assure herself that said policy is being so maintained, and for that purpose the Father hereby authorizes her to sign his name to any request for information and to receive such information.

FOURTH: The Father shall support Philip as follows, and the Mother shall not take any further court action or proceedings against him for Philip's support as long as he does so:

BEST COPY AVAILABLE

EXHIBIT B, ANNEXED TO COMPUTATION OF ARREARS

A. Commencing with the date of this agreement and continuing on the first day of each month thereafter, the Father shall send the Mother \$220.00, which amount shall be increased to \$260.00 when Philip enters high school and to \$300.00 when he enters college.

Said support payments shall continue while Philip is visiting the Father and while he is attending local or boarding high school or college. Said support payments shall cease when Philip becomes 21 years old, marries, becomes emancipated, dies or enters military service, whichever occurs first, except that they shall continue in any event while he is attending undergraduate college whether or not such attendance shall have been postponed or delayed by reason of military service.

B. The Father shall pay the arrears in Philip's support as follows, which arrears are to include the amount of the cancelled alimony arrears and are hereby fixed at \$12,126.00;

EXHIBIT B, ANNEXED TO COMPUTATION OF ARREARS

1. Commencing on September 1, 1968, and continuing on the first day of each month thereafter, the Father shall send the Mother \$100.00 until she shall have received \$1,200.00.
2. After said \$1,200.00 shall have been paid, the Father shall on the first day of each month invest \$100.00 in a mutual fund or funds in the name of the Mother as custodian for Philip under the Uniform Gifts to Minors Act, with the confirmation slips to be sent directly to the Mother by such fund or funds. The Mother shall be able to hold or dispose of such fund or funds at will and to use the proceeds for Philip's support and education.
3. In addition to said monthly payments of \$100.00 each, on or before April 15, 1969, and each succeeding April 15th, the Father shall send the Mother a true copy of the first page of his United States income tax return for the preceding calendar year bearing the official receipt stamp of the Internal Revenue Service showing the filing of the original, and at the same time the Father shall send the Mother an amount equal to 25% of the amount shown on said return by which his gross income exceeded \$20,000.00.

EXHIBIT B, ANNEXED TO COMPUTATION OF ARREARS

In lieu of thus disclosing his income tax return and computing the amount so due, the Father may at his option for any year make a lump sum payment in the amount of \$2,500.00 on or before each such April 15th.

Such payments shall continue until the arrears for Philip's support shall have been paid in full. Such payments shall be made by investment in a mutual fund or funds on the same terms as provided in the sub-paragraph 2 immediately above.

C. Before October 1, 1968, the Father shall pay the sum of \$1,052.47 to Layton, Niedergang & Wise in payment of the judgments of the Family Court and the Supreme Court, Kings County, for counsel fees outstanding against him, and said attorneys and Stephen A. Wise shall file satisfactions of judgments upon receipt of said payments.

D. The following terms shall apply to the Father's support obligation under this agreement:

EXHIBIT B, ANNEXED TO COMPUTATION OF ARREARS

1. Provided the Father regularly makes the payments required under this agreement, in May of 1969 and each May thereafter the Mother shall take the following steps and send the Father copies of any papers executed by her for that purpose:

a. She shall notify the Clerk of the Family Court, Kings County, of the payments received to date by her from the Father on account of Philip's current support and arrears thereon.

b. She shall simultaneously file partial satisfactions of the judgment of \$8,586.00 in the Family Court, Kings County, entered October 13, 1967 to the extent of the payments received. After said judgment shall be satisfied in full, and when the balance of \$3,540.00 remaining from the total arrears of \$12,126.00 shall be received by the Mother from the Father, she shall file a satisfaction of the judgment of \$2,839.75 in the Supreme Court action entered October 13, 1967.

2. Provided the Father regularly makes the payments required under this agreement, he shall have the right to prepare his income tax returns for the calendar year

EXHIBIT B, ANNEXED TO COMPUTATION OF ARREARS

1968 and thereafter listing Philip as his exemption, and the Mother shall not list Philip as her exemption.

3. Neither the Father nor Philip shall be entitled to any accounting by the Mother of her use of any payments received by her under this agreement.

4. In the event of any default of more than ten days by the Father in making any payment provided for in this agreement, of which default notice need not be given to him, he shall be required to pay \$5.00 for each day of such default from the commencement thereof to its termination.

5. In the event of any default of more than thirty days by the Father in making any payment provided for in this agreement, and the continuation of such default for more than ten days after the posting of notice thereof to the Father, both of the following consequences shall occur:

a. The Mother may forthwith seek relief in the Family Court proceeding in Brooklyn on her own affidavit or the affidavit of her attorney without further notice to the Father; and

EXHIBIT B, ANNEXED TO COMPUTATION OF ARREARS

b. The Mother's right to receive alimony of \$35.00 per week shall revive without further action on her part and continue until her death or remarriage, whichever occurs first. The same revival of alimony shall apply in the event the Father shall fail to maintain his National Service Life Insurance as required in paragraph SECOND above.

6. In the event of any bankruptcy or assignment for the benefit of creditors by the Father, the Mother shall be entitled immediately to recover from the Father all amounts then due and unsatisfied on her judgment for alimony in the Supreme Court, Kings County (Index No. 163/1966), together with all alimony payments between the date of this agreement and the date of such bankruptcy or assignment at the rate of \$35.00 per week as specified in the separation agreement of February 3, 1961.

7. In the event of any action or proceedings by the Mother to enforce this agreement, her attorneys shall be entitled to recover reasonable counsel fees from the Father. In implementation of the continuing jurisdiction of the Family Court and the Supreme Court in Brooklyn, the Father agrees that service of any papers in the existing proceeding

EXHIBIT B, ANNEXED TO COMPUTATION OF ARREARS

and action in said respective courts may be made upon him by mail addressed to him at Box 3673, Grand Central Station, New York, New York, or such later address as he may hereafter designate pursuant to paragraph SIXTH of this agreement.

FIFTH: The Mother shall have custody of Philip and control of his upbringing and education. Provided the Father regularly makes the payments required under this agreement, the Father shall have the following visitation rights:

A. During Philip's summer vacation each year, the full month of either July or August, with the Father having the choice provided he shall notify the Mother in writing before May 1st each year.

B. During Philip's Christmas or Spring vacations, the whole of one such vacation each year starting on the Sunday after the close of school and ending on the Saturday before the reopening of school, with the Father having the choice provided he shall notify the Mother in writing before December 1st if he shall choose the Christmas vacation and before March 1st if he shall choose the Spring vacation. At the beginning of each school year the Mother shall notify the Father by certified mail of Philip's school's vacation schedule for the coming year.

EXHIBIT B, ANNEXED TO COMPUTATION OF ARREARS

C. During the months when Philip shall not be visiting the Father in vacation periods as provided above, liberal visitation rights including at least one weekend each month, provided, however, that such visitation shall be only in the city where Philip shall then be living and its immediately surrounding area.

D. The Father's visitation shall be subject to the following terms:

1. The Father shall not remove Philip from the continental United States of America without the Mother's written permission.

2. While the Father shall have Philip with him for visitation periods longer than a weekend the Father shall keep the Mother advised of Philip's whereabouts.

3. During any visitation period when the Father has Philip within 50 miles of New York City he shall make Philip available to his maternal grandmother for at least one Saturday or one Sunday of visitation. If the maternal grandmother shall have Philip visiting her, ^{MOTHER} she shall so notify the Father.

EXHIBIT B, ANNEXED TO COMPUTATION OF ARREARS

4. During any visitation, the Father shall pay the full cost of transporting Philip to visit him and back to the Mother's residence.

5. In the event that visitation shall be impossible because of illness or other reason, the Father shall be entitled to make up such visitation as soon as Philip shall have a like period of vacation or weekend.

6. Any dispute between the Father and the Mother as to visitation shall be settled by arbitration before the then Chairman of the Family Court Committee of the Association of the Bar of the City of New York, or any other person designated by him. Such arbitration shall be initiated by a letter to said Chairman requesting the same, with a copy going to the other party by certified mail, and said arbitration shall proceed as rapidly as the arbitrator shall direct. Any charges by the arbitrator for his services and disbursements shall be paid by the Father, the Mother or both as directed by the arbitrator.

Whichever party has Philip at any particular time shall permit the other party to telephone or write to Philip freely.

EXHIBIT B, ANNEXED TO COMPUTATION OF ARREARS

In the event of Philip's serious illness, the party with whom he then is shall notify the other party promptly, and both parties shall have full access to all medical information concerning Philip.

SIXTH: The addresses of the parties for all purposes under this agreement shall be:

Father: Box 3673
Grand Central Station
New York, N. Y. 10017

Mother: 14646 Dickens Street
Sherman Oaks, California 91403

Each party hereto may at any time and from time to time change his or her address for all purposes under this agreement by advising the other party of such new address by written notice forwarded to the address of the other party hereinabove set forth. All notices required to be given in writing and statements required to be delivered or rendered under this agreement by either party to the other shall be sent by certified mail.

EXHIBIT B, ANNEXED TO COMPUTATION OF ARREARS

SEVENTH: The following general rules shall be applied to the construction and operation of this agreement:

A. This agreement is entire and complete and embodies all understandings and agreements of the parties, and no representations, agreements, undertakings or warranties of any kind or nature have been made to the other party to induce the making of this agreement, except as is expressly set forth in this agreement, and each of the parties agrees not to assert to the contrary, and that there is no other agreement, oral or written, existing between them. No oral statement or prior written matter extrinsic to this agreement shall have any force or effect.

B. This agreement and all the obligations and covenants hereunder shall bind the parties hereto, their heirs, executors, administrators, legal representatives and assigns, and shall inure to the benefit of their respective heirs, executors, administrators, legal representatives and assigns.


C. No modification, rescission or amendment to this agreement shall be effective unless in writing, signed by each of the parties hereto, and acknowledged by each of them before a notary public.

EXHIBIT B, ANNEXED TO COMPUTATION OF ARREARS


D. The parties agree that there have been no representations or warranties by either made to the other, excepting those specifically herein set forth in writing, and that each party is entering into this agreement freely and voluntarily after careful review of all the provisions thereof with his or her own counsel.

E. All matters affecting the interpretation of this agreement and the rights of the parties hereto shall be governed by the Laws of the State of New York.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals as of the day and year first above written.



Robert K. Golden, Father



Renee W. Golden, Mother

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EXHIBIT B, ANNEXED TO COMPUTATION OF ARREARS

STATE OF NEW YORK)
 COUNTY OF NEW YORK) SS.:

On the 14 day of February, 1968, before me personally came ROBERT K. GOLDEN, to me known and known to me to be the individual described in and who executed the foregoing instrument, and acknowledged that he executed the same.

Ken E. L...
 Notary Public

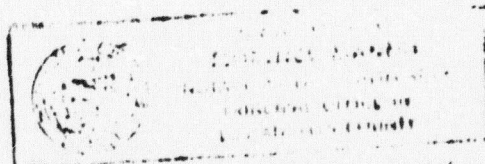
Notary Public
 No. 1
 Qualified in New York
 Commission Expires 12/31/73

STATE OF CALIFORNIA)
 COUNTY OF LOS ANGELES) SS.:

On the 16 day of February, 1968, before me personally came RENEE W. GOLDEN, to me known and known to me to be the individual described in and who executed the foregoing instrument, and acknowledged that she executed the same.

Alma M...
 Notary Public

BEST COPY AVAILABLE



My Commission Expires 12/31/73

DEFENDANT'S EXHIBIT A, MAY 1, 1975--ORDER AND JUDGMENT OF
GARTENSTEIN, J. (FAMILY COURT, KINGS COUNTY).

RECEIVED
NOV 27 1974
CLERK OF COURT
REFER TO.....

At Part IV of the Family Court,
held in and for the County of
Kings, at the Courthouse located
at 283 Adams Street, in the
Borough of Brooklyn, State of
New York, on the 17 day of
November, 1974.

Decker

P R E S E N T :

HON. STANLEY GARTENSTEIN

Judge

_____ x
In the Matter of

RENEE GOLDEN,

: Docket No. F2997/63

Petitioner,

:

-against-

ORDER AND JUDGMENT

ROBERT GOLDEN,

:

Respondent.
_____ x

The above entitled proceeding having been duly
brought by the Petitioner, RENEE GOLDEN, against the Re-
spondent, ROBERT GOLDEN, for recovery of arrears of support
due Petitioner and the parties' infant son, PHILIP ANDREW
GOLDEN, and for present support of the Petitioner and the

DEFENDANT'S EXHIBIT A, MAY 1, 1975

parties' said infant son, and for an order by this Court directing the Respondent to comply with the order of this Court made by the Hon. Juvenal Marchisio on March 14, 1968, in which was incorporated by reference an agreement in writing made and entered into by the Petitioner and Respondent on March 1, 1968, and the Respondent having appeared herein by Messrs. Orans, Elsen & Polstein, his attorneys, and the Respondent having moved this Court for downward modification of support and other related relief, and a trial of the issues having been had before this Court on the 29th and 30th days of July, 1974 and on the 7th day of October, 1974, and the Petitioner having appeared before me by her attorneys, Messrs. Lotwin, Goldman, Rosen & Greene, by Ralph C. Goldman, Esq., and the Respondent having appeared before me by his attorneys, Messrs. Orans, Elsen & Polstein, by Anthony J. Ferrara, Esq., and testimony having been given in open Court, as aforesaid, and the undersigned having heard and considered the proof offered and made a decision in writing dated October 30, 1974,

NOW, on motion of Messrs. Lotwin, Goldman, Rosen & Greene, by Ralph C. Goldman, Esq., attorneys for the

DEFENDANT'S EXHIBIT A, MAY 1, 1975

Petitioner, it is

ORDERED AND ADJUDGED, that Petitioner's application for recovery of arrears of support due Petitioner and the parties' infant son, PHILIP ANDREW GOLDEN, and for present support of the Petitioner and the parties' said infant son and for an order by this Court directing the Respondent to comply with the order of this Court dated March 14, 1968, made by the Hon. Juvenal Marchisio is granted; and it is further

ORDERED AND ADJUDGED, that the Respondent's failure to make payments pursuant to the aforesaid order was wilful, unilaterally assumed with actual or attributable knowledge of its consequences and at a time when Respondent was and still is fully capable of making such payments; and it is further

ORDERED AND ADJUDGED, that arrears of support due the Petitioner and the parties' infant son by the Respondent are hereby fixed in the aggregate sum of Thirty Five Thousand Eighty Six (\$35,086.) Dollars, of which amount Twenty One Thousand Five Hundred Sixty (\$21,560.) Dollars represents arrears of support due Petitioner and Thirteen Thousand Five Hundred Twenty Six (\$13,526.) Dollars represents arrears of

DEFENDANT'S EXHIBIT A, MAY 1, 1975

support due the parties' infant son; and it is further

ORDERED AND ADJUDGED, that the doctrine of laches interposed by the Respondent as a purported bar to the within enforcement proceedings is wholly inapplicable both as a matter of law and on the instant facts before the Court; and it is further

ORDERED AND ADJUDGED, that supplementary to the within order of this Court, Petitioner is hereby additionally granted leave to docket a money judgment against the Respondent for the full amount of the arrears heretofore set forth, to wit, the sum of Thirty Five Thousand Eighty Six (\$35,086.) Dollars, and to levy execution and/or enforce the same in accordance with such remedies as are granted by the Civil Practice Law and Rules; and it is further

ORDERED AND ADJUDGED, that Respondent is hereby directed to post forthwith a cash bond in the sum of Fifteen Hundred (\$1500.) Dollars with the Accounts and Records Bureau of this Court upon service of a copy of this order upon Respondent's counsel, and, in default thereof, Respondent shall serve fifteen (15) days in the workhouse; the Accounts and

DEFENDANT'S EXHIBIT A, MAY 1, 1975

Records Bureau, upon receipt of said cash bond in the stated sum of Fifteen Hundred (\$1500.) Dollars, will remit payment thereof to the Petitioner. The posting of such cash bond by the Respondent is hereby stayed for a period of ten (10) days in order to permit compliance by the Respondent with this directive; and it is further

ORDERED AND ADJUDGED, that the order of this Court dated March 14, 1968, is hereby continued; and it is further

ORDERED AND ADJUDGED, that the Respondent shall pay to the Petitioner the following sums of money which are provided for in the agreement entered into by the parties on March 1, 1968 and which was the basis of the order made by this Court on March 14, 1968:

- a) The sum of Two Hundred Sixty (\$260.) Dollars per month as and for the support of the parties' infant son which amount shall be increased to the sum of Three Hundred (\$300.) Dollars per month when he shall enter college;
- b) The sum of One Hundred Fifty Two (\$152.) Dollars per month for the support of the Petitioner (computed on the basis of Thirty Five (\$35.) Dollars per week multiplied by $4 \frac{1}{3}$ weeks); and

DEFENDANT'S EXHIBIT A, MAY 1, 1975

- c) In reduction of the arrears of support due Petitioner and the parties' infant son, as aforesaid, the sum of One Hundred Eight (\$108.) Dollars per month (computed on the basis of Twenty Five (\$25.) Dollars per week multiplied by $4 \frac{1}{3}$ weeks); and of such arrearage of support payment of One Hundred Eight (\$108.) Dollars per month, the sum of Sixty Five and $\frac{88}{100}$ (\$65.88) Dollars shall be attributable to support of the Petitioner, and the balance thereof, to wit, the sum of Forty Two and $\frac{12}{100}$ (\$42.12) shall be attributable to the support of the parties' infant son;

and it is further

ORDERED AND ADJUDGED, that the payments directed to be made by Respondent:

1. In section (a) of the immediately preceding decretal paragraph shall continue until the parties' infant son shall attain the age of twenty-one (21) years, marries, becomes emancipated, dies or enters the military service, whichever occurs first, except that they shall continue in any event while he is attending undergraduate college whether or not such attendance shall have been postponed or delayed by reason of military service;

2. In section (b) of the immediately preceding

DEFENDANT'S EXHIBIT A, MAY 1, 1975

decretal paragraph shall continue until the Petitioner's remarriage or death, whichever shall first occur; and

3. In section (c) of the immediately preceding decretal paragraph shall continue until the entire arrearage of support in the stated sum of Thirty Five Thousand Eighty Six (\$35,086.) Dollars shall have been paid in full giving credit, however, to the Respondent for any sums which may be recovered by Petitioner pursuant ^{to} such remedies as are available to her under the Civil Practice Law and Rules; and it is further

ORDERED AND ADJUDGED, that the payments of Two Hundred Sixty (\$260.) Dollars per month to be made by Respondent to Petitioner for support of the parties' infant son shall continue to be made by him on the 15th day of each month as directed by the order of Hon. Maxine K. Duberstein dated April 4, 1974; the payments of One Hundred Fifty Two (\$152.) Dollars per month to be made by Respondent to Petitioner for her support, and the payments of One Hundred Eight (\$108.) Dollars per month to be made by Respondent to Petitioner in reduction of arrears of support shall each be paid by the Respondent commencing as of the 15th day of November, 1974, and

DEFENDANT'S EXHIBIT A, MAY 1, 1975

continuing in like amount on the 15th day of each month subsequent thereto until such time as required by the terms of this order, provided, however, that the first payment thereof shall be made by Respondent within three (3) days after service of a copy of this order with notice of entry upon counsel for the Respondent; and it is further

ORDERED AND ADJUDGED, that upon the first default committed by the Respondent in making the payments required of him pursuant to this order, this Court will direct the Respondent, upon application by the Petitioner, to post a cash bond in the sum of Five Thousand (\$5,000.) Dollars with the Clerk of this Court; and it is further

ORDERED AND ADJUDGED, that Respondent's application for downward modification of support and other related relief is denied in its entirety; and it is further

ORDERED AND ADJUDGED, that nothing herein contained shall permit double collection of the same obligation; therefore, any funds which Petitioner may recover pursuant to the money judgment awarded her herein by virtue of the remedies available to her pursuant to the Civil Practice Law and Rules, and the payments to be made by the Respondent in reduction of

DEFENDANT'S EXHIBIT A, MAY 1, 1975

the arrears of support pursuant to the within order are to be construed as supplementary to each other; and it is further

ORDERED AND ADJUDGED, that Respondent pay to Messrs. Lotwin, Goldman, Rosen & Greene, the attorneys for the Petitioner, at its offices situated at 540 Madison Avenue, New York, N. Y. 10022, the sum of Five Thousand (\$5,000.) Dollars as and for counsel fees in this proceeding and the sum of One Hundred Sixty Nine and 12/100 (\$169.12) for legal disbursements incurred, the payment thereof to be made by Respondent as follows:

- a) The sum of Two Thousand One Hundred Sixty Nine and 12/100 (\$2,169.12) Dollars within ten (10) days after service of this order with notice of entry upon the attorneys for the Respondent; and
- b) The sum of Three Thousand (\$3,000.) Dollars in six (6) equal monthly instalments of Five Hundred (\$500.) Dollars each commencing on the 40th day after service of this order with notice of entry upon the attorneys for the Respondent and continuing monthly thereafter at thirty (30) day intervals until paid in full;

and it is further

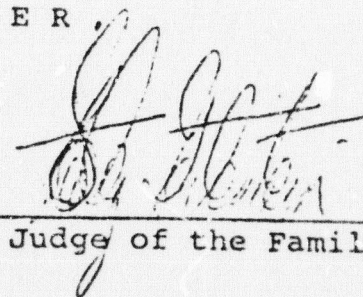
ORDERED AND ADJUDGED, that in the event the Re-

DEFENDANT'S EXHIBIT A, MAY 1, 1975

spondent shall default in making payments of Petitioner's counsel fees, as above provided, the amount thereof remaining, after giving credit to the Respondent for payments theretofore made by him on account thereof, shall be immediately accelerated and counsel for the Petitioner shall be entitled to enter a money judgment against the Respondent for the balance thereof, and to pursue such remedies as are available to Petitioner's counsel pursuant to the Civil Practice Law and Rules; and it is further

ORDERED AND ADJUDGED, that Respondent shall make all payments of arrears of support due the Petitioner and the parties' infant son, and all payments of current support due the Petitioner and the parties' infant son through the Accounts and Records Bureau of this Court.

ENTER



Judge of the Family Court

-10-

THIS IS TO CERTIFY THAT THIS IS
TRUE COPY OF Order of Support
MADE IN THE CASE 17-1116 FILED IN SUCH CASE
AND SIGNED BY Judge of the Family Court
OF THE COUNTY OF NEW YORK, FOR THE CITY OF
New York, FOR THE
17-1116 17-1116
DATE Dec 17 1974

OPINION AND ORDER BY ROY BABITT, BANKRUPTCY JUDGE.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

In the Matter :

-of- :

ROBERT K. GOLDEN, :

Bankrupt, : 74 E 1881

ROBERT K. GOLDEN, : OPINION

Plaintiff, :

-v- :

RENEE GOLDEN, :

Defendant. :

-----X

APPEARANCES:

GEORGE FRIEDMAN, ESQ.,
Attorney for Bankrupt
295 Madison Avenue
New York, New York 10017

GELBWAKS & POLLACK, ESQS.,
Attorneys for Defendant, Renee Golden
299 Broadway
New York, New York 10007

* * * * *

ROY BABITT, Bankruptcy Judge:

OPINION AND ORDER BY ROY BABITT, BANKRUPTCY JUDGE

Robert K. Golden filed a voluntary petition in bankruptcy on December 31, 1974. Two weeks earlier, the bankrupt's ex-wife, defendant herein, recovered a judgment against him in the Family Court, Kings County, New York. This court issued a temporary restraining order staying Mrs. Golden from enforcing her judgment until the question of dischargeability of this debt could be resolved as provided for by Section 17c(4) of the Bankruptcy Act, 11 U.S.C. § 35c(4). The bankrupt received a discharge of his dischargeable debts, Section 14 of the Act, 11 U.S.C. § 32, but sensing his potential continuing undischarged debt based on alimony under Section 17a(7), 11 U.S.C. § 35a(7), and realizing the limited reach of Rule 401(a), 411 U.S. 1048, in respect of such a debt, he filed a complaint here seeking judgment that the bulk of the debt was indeed within the purview of the discharge. This method of procedure is, of course, now mandated by Rule 703, 411 U.S. 1069, for cases under Rule 701(7), 411 U.S. 1068, which this concededly is. The bankrupt's suit was timely under Section 17c(1), 11 U.S.C. § 35c(1). The essence of the suit is the claim that the

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OPINION AND ORDER BY ROY BABITT, BANKRUPTCY JUDGE

bulk of the debt, as determined by the Family Court, is not alimony which under Section 17a(7) would survive discharge, but rather a debt on a penalty for default of alimony payments and therefore outside the reach of Section 17a(7) since the debt must be looked at as a simple non-alimony debt. The wife's answer pleaded the Family Court judgment as a bar.

The court is concerned with two separation agreements. The first, dated February 3, 1961 was cancelled and terminated by the second and current agreement, dated March 1, 1968. This agreement provided, among other things, for the payment of alimony arrears totalling \$12,126. in installments, for which the wife agreed to waive her right to future alimony. Support and maintenance of their son was to be continued at specified monthly rates. In the event of the bankrupt's default in any payments, the agreement provided that he would be charged a penalty of \$5. per day for every day payment was late and after 30 days of continued default, the obligation to pay alimony under the first separation agreement was revived (\$35. per week) and was to become due and payable in addition to the \$5. per day penalty. The bankrupt defaulted

OPINION AND ORDER BY ROY BABITT, BANKRUPTCY JUDGE

under this agreement and his ex-wife sued in Family Court, Kings County and recovered a judgment for some \$35,000.

The bankrupt contends that that part of the judgment relating to the revival of alimony at the \$5. per day penalty is dischargeable in bankruptcy as such debt is in the nature of "simple debts owed by a husband to his former wife," which does not constitute support and therefore as a "simple debt" it is dischargeable. This court does not agree.

It is well established that courts in bankruptcy have jurisdiction to look behind the judgment of another court, in order that it might determine the dischargeability of particular debts. In re Abramson, et al, 210 Fed. 878 (2d Cir. 1914); Cf. Pepper v. Litton, 308 U.S. 295 (1939). The judgment in question includes an amount for alimony arrears of \$12,126. which accrued prior to the new agreement and was recited therein, support and maintenance arising after bankrupt's default under the new agreement by the revival of the obligation to pay alimony, plus the \$5. per day "penalty" charge totalling \$18,020., along with arrears for support of the son in the amount of \$4,940.

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OPINION AND ORDER BY ROY BABITT, BANKRUPTCY JUDGE

The debt evidenced by the judgment is for alimony and support under the separation agreements. Here, as in cases with similar fact patterns, the separation agreement is adequate consideration supporting a promise to pay support and maintenance of wife and child and does not create an independent debt which might be dischargeable in bankruptcy. In re Ridder, 79 F.2d 524 (2d Cir. 1935), cert. denied 297 U.S. 721 (1936). The bankrupt's contention that the obligation to pay underlying the judgment is based on a simple dischargeable debt is without merit.

The bankrupt insists that the debt of \$9,060. representing revived alimony at \$35. per week and \$8,960. representing the \$5. per day penalty, or a total of \$18,020. whatever it may represent, does not constitute support. He grounds this contention on the fact that provision was made for support and maintenance in the second separation agreement and that the debts represented here are not for support and maintenance, since they only arose when the bankrupt should default on payments which were indeed for support and maintenance. He further contends that the obligation

OPINION AND ORDER BY ROY BABITT, BANKRUPTCY JUDGE

to pay these additional sums is imposed as an incentive to the bankrupt not to default, is in addition to his obligation for past due and prospective support in the nature of liquidated damages and therefore is clearly not for support within the intent of Section 17a(7).

Whether a debt is for support and maintenance depends on its essential nature, rather than upon the form in which it is garbed. Krupp v. Felter, 77 N.Y.Supp. 2d 665 (S.C.N.Y. - 1948), affirmed 80 N.Y.S. 2d 892 (App. Div. 1948). The computation of arrears incorporated in the Family Court judgment refers to these debts as "support" even though they arise only on the bankrupt's default. At first blush, without considering the totality of the facts surrounding the separation agreements it might appear that the debt here in question is not for support. However, at second blush, it becomes clear that both the revived alimony and the \$5. per day late charge are in the nature of support. In the original separation agreement the wife was to receive \$35. per week alimony. In the current agreement the wife waived this alimony provision in future so long as the bankrupt kept current on his

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OPINION AND ORDER BY ROY BABITT, BANKRUPTCY JUDGE

payment of the arrears. The bankrupt, on his part, agreed that in the event he defaulted in any of the payments outlined in the new agreement, his obligation to pay alimony was revived. Certainly the obligation to pay alimony is in the nature of support to which the wife is entitled. It is abundantly clear that the wife did not entirely relinquish this right to alimony. She merely agreed that in the event the bankrupt kept his payments current she would not insist on these additional payments. In re Ridder, supra.

In dealing with the provision of the separation agreement which relates to the \$5. per day late charge, it is possible to read this part of the judgment as being in the nature of a penalty for the bankrupt's failure to perform his obligation under the agreement. If this were the case, such a position is of no help to the bankrupt for it is generally accepted that a liability for penalties is not dischargeable in bankruptcy. In re Abramson, supra; cited with approval in Custom Wood Products, Inc., v. United States, 338 F. Supp. 337 (W.D. Mich. 1971). It is particularly so here, where the "penalty" is directly related to the alimony

OPINION AND ORDER BY ROY BABITT, BANKRUPTCY JUDGE

and support which are themselves nondischargeable debts.

The bankrupt argues that if the court finds the \$5. per day charge to be a penalty, then the facts of Kroll v. Kroll, 158 N.Y.Supp. 2d 930 (S.C.N.Y. 1956) control. He cites this case for the proposition that contractual penalties, even in matrimonial cases are against the public policy of the State of New York and therefore unenforceable. The facts in the Kroll case are distinguishable from the facts before me now. But if the bankrupt is correct in this then such argument should have been made to the Family Court judge before judgment. It might even be made if enforcement of that judgment is sought. Here, I do no more than determine whether or not the debt survives discharge; I do not deal with enforcement of it, a matter for the State courts. In any event, in Kroll, the separation agreement provided for support payments of \$180. per week and in the event the husband defaulted, the payments of \$180. per week would terminate and he would be obligated to pay \$400. per week. This provision is clearly penal in nature. The obligation to pay the increased alimony continues even in the event payments are brought current. In the agreement in issue here, the bankrupt's


OPINION AND ORDER BY ROY BABITT, BANKRUPTCY JUDGE

obligation to pay the additional \$5. per day ceases upon bringing the payments current. The \$5. charge has a direct relation to the initial obligation to pay alimony (\$35. per week) and is not so excessive as to violate public policy.

The court is well aware of the tension between the scheme of the Bankruptcy Act which seeks rehabilitation of a bankrupt and emergence free of financial burdens and the scheme of the Act that provisions for alimony and support should survive. The competing policies are obvious. Here the bankrupt is not to convert alimony and support into a simple contract debt, thereby emerging free of debt while his ex-wife and child are denied what Congress decided they should have.

This court vacates its temporary restraining order and concludes that the judgment of the Family Court for alimony and support is not a debt dischargeable in bankruptcy. The complaint is dismissed and the defendant is free to pursue her remedies in State court. It is so ordered.

Dated: New York, New York
June 3, 1975.


Bankruptcy Judge

NOTICE OF APPEAL TO DISTRICT COURT FROM ORDER OF HON. ROY
BABITT, BANKRUPTCY JUDGE.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK -- -- -X

In the Matter

of

ROBERT K. GOLDEN,

Bankrupt,

ROBERT K. GOLDEN,

Plaintiff,

-v-

RENEE GOLDEN,

Defendant.

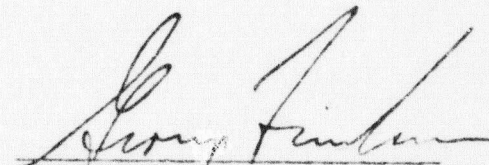
In Bankruptcy
No. 74-B-1881

NOTICE OF APPEAL

-----X

ROBERT K. GOLDEN, Plaintiff herein, appeals to the District Court from the Order of Hon. Roy Babitt, Bankruptcy Judge, dated June 3, 1975 dismissing the complaint herein and concluding that the debt owed to defendant is not dischargeable, and said appellant appeals from each and every part of said Order on the grounds that same is contrary to the law and facts.

Dated: New York, New York
June 30, 1975


GEORGE FRIEDMAN
Attorney for Appellant
Robert K. Golden
295 Madison Avenue
New York, N.Y. 10017
(212) 685-1264

GELBWAKS & POLLACK, ESQS.
Attorneys for Defendant
Renee Golden
299 Broadway
New York, N.Y. 10007

APPELLANT'S DESIGNATION AND STATEMENT OF ISSUES.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK - - -X

In the Matter

of

ROBERT K. GOLDEN,

Bankrupt,

ROBERT K. GOLDEN,

Plaintiff-Appellant,

-v-

RENEE GOLDEN,

Defendant-Appellee.

In Bankruptcy
 No. 74-R-1881

APPELLANT'S
 DESIGNATION AND
 STATEMENT OF ISSUES

- - - - -X

S I P:

ROBERT K. GOLDEN, Appellant herein, hereby designates the following for inclusion in the record on appeal:

1. Plaintiff's Exhibit "1", Trial of May 1, 1975, copy of Agreement dated March 1, 1968;
2. Defendant's Exhibit "1", Trial of May 1, 1975, Order and Judgement of Family Court dated December 17, 1974;
3. Complete transcript of minutes of trial held May 1, 1975;
4. Complaint;
5. Answer;
6. Order and Opinion of Bankruptcy Judge Rabitt, June 3, 1975.

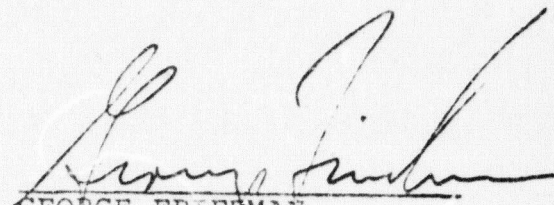
A Statement of the Issues to be presented on the within Appeal

are as follows:

The Bankruptcy Judge was in error, on the law and the facts, in concluding that the contested debt was non-dischargeable; the Bankruptcy Judge was in error in concluding that a contractual penalty between private parties is not dischargeable; the Bankruptcy Judge was in error, on the law and the facts, in concluding that the contested debt was not, in whole or in part, a contractual penalty which is unenforceable as being against public policy; the Bankruptcy Judge was in error, on the law and the facts, in concluding that the contested debt was wholly for support and therefore not dischargeable; the Bankruptcy Judge was otherwise in error in considering facts not in evidence and dismissing the complaint.

APPELLANT'S DESIGNATION AND STATEMENT OF ISSUES

Dated: New York, New York
July 28, 1975



GEORGE FRIEDMAN
Attorney for Appellant
295 Madison Avenue
New York, New York
10017
(212) 685-1264

GELBWAKS & POLLACK
Attorneys for Appellee
299 Broadway
New York, New York 10007

OPINION - ORDER BY WEINFELD, D.J., APPEALED FROM.
 UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

----- x

In the Matter

of

ROBERT K. GOLDEN,

Bankrupt.

ROBERT K. GOLDEN,

Plaintiff-Appellant,

-against-

RENEE GOLDEN,

Defendant-Appellee.

----- x

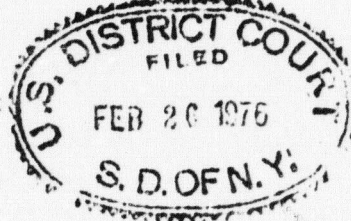
GEORGE FRIEDMAN, ESQ.
 295 Madison Avenue
 New York, New York

Attorney for Appellant

GELBWAKS & POLLACK, ESQS.
 299 Broadway
 New York, New York

Attorneys for Appellee

AARON GELBWAKS, ESQ.
 Of Counsel



In Bankruptcy
 No. 74 B 1881

OPINION

H 4397

OPINION - ORDER BY WEINFELD, D.J., APPEALED FROM
EDWARD WEINFELD, D. J.

This is an appeal by Robert K. Golden (petitioner), a voluntary bankrupt, from a determination by the Bankruptcy Judge that certain obligations due to Ruth Golden, his former wife (respondent), pursuant to a judgment entered against the bankrupt in the Family Court, Kings County, New York, constituted alimony and support and were not debts dischargeable in bankruptcy. (1) Golden filed his voluntary petition in bankruptcy on December 31, 1974, two weeks after his ex-wife recovered the judgment against him in the Family Court.

Shortly before their divorce, the Goldens entered into a separation agreement on February 3, 1961, which obligated the husband to pay a stipulated sum for the support of their minor son and \$35 per week alimony. Golden defaulted in his obligations, as a result of which, based upon proceedings in the Family Court, a warrant for his arrest was issued. Subsequently, in October 1967,

(1) § 17(a)(7) of the Bankruptcy Act, 11 U.S.C. § 35(a)(7), provides: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . are for alimony due or to become due, or for maintenance or support of wife or child"

OPINION - ORDER BY WEINFELD, D.J., APPEALED FROM
judgments for arrears were entered against him in the
total sum of \$13,126.

Thereafter, on March 1, 1968, the parties entered into a second agreement, which cancelled the prior agreement. The second agreement was incorporated by reference in an order entered by the Family Court on March 14, 1968, which specifically directed the parties to comply with its terms. Among other matters, the order of March 14, 1968 vacated an outstanding order for Golden's arrest and also a prior contempt order for failure to pay for the support and maintenance of the wife and child, and directed that Golden pay arrears of alimony and child support totaling \$13,126 in installments. Pursuant to its terms, the wife waived her right to future alimony; support and maintenance of the son was to be continued at specified monthly rates. The order further provided that in the event of Golden's default of more than ten days in making any payment required thereunder, he was to pay \$5 per day for each day of default, and after thirty days of continued default his obligation to pay alimony of \$35 per week under the first separation agreement was revived.

OPINION - ORDER BY WEINFELD, D.J., APPEALED FROM

Golden failed to comply with the terms of the order of March 14, 1968. The respondent herein then commenced another proceeding in the Family Court for recovery of arrears for support due her and the infant son and for their continuing support. On December 11, 1974 the Family Court entered an order which adjudged that Golden's failure to make the payments as directed by the March 14, 1968 order was wilful, and judgment was entered against him for arrears of support due to his former wife and their infant son in the aggregate sum of \$35,086. Of this sum, \$9,060 was for "revived alimony" of \$35 per week, and \$8,960 was for default payments of \$5 per day. These are the items that are here at issue.

Bankruptcy Judge Babitt rejected the bankrupt's contention that those amounts were dischargeable as "simple contractual debts owed by a husband to his former wife," which do not constitute support. He held that the revived alimony and default items were debts for alimony, maintenance and support and therefore nondischargeable under section 17(a)(7) of the Bankruptcy Act. Judge Babitt further ruled that even if the \$5 per day default item was a penalty, it was nondischargeable and not so excessive as

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to violate public policy, and in any event its enforcement was a matter to be considered solely by the state courts.

The language of the Family Court judgment of December 17, 1974 is clear and explicit that the total sum of \$35,086 represents "arrears of support due" the wife and the parties' infant son. Despite this unequivocal language, the bankrupt contends that the amounts for the revived alimony of \$35 per week and the \$5 per day payable upon his default, or a total of \$18,020, have no relationship to the support of respondent.

He urges that this Court look behind the Family Court judgment and find that other provisions of the parties' agreement amply provided for the ex-wife's support and that the provisions for revived alimony and default payment constitute "simple contractual obligations" in the nature of liquidated damages or a penalty and are therefore nondischargeable. He analogizes the instant situation to cases holding that debts due under divorce decrees or separation agreements may be discharged where they derive from property settlements rather than support

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(2)
obligations. In sum, petitioner contends that the items here at issue, no matter how described by the parties or in the judgment of the Family Court, do not represent support obligations but are "mere contractual debts" which are dischargeable.

The first flaw in this contention is the failure to recognize that the contractual obligations were incorporated by reference in the Family Court order of March 14, 1968, which directed the parties to comply with its provisions, and as an incident thereof vacated a warrant for his arrest and a contempt order for petitioner's failure to provide support for his wife and child. The further difficulty with his contention is the failure to recognize that all of the sums due under the judgment, including those at issue here, have their genesis in that failure and his continuing obligation to support his wife and child. The so-called "penalty" provisions, no less than the other provisions of the 1968 agreement, were part and parcel of the consideration to and accepted by Mrs.

(2) See, e.g., *Tropp v. Tropp*, 129 Cal. App. 62, 18 P.2d 385 (1933); *Fernandes v. Pitta*, 47 Cal. App. 2d 248, 117 P.2d 728 (1941). See also *Caldwell v. Armstrong*, 342 F.2d 405, 488 n.5 (6th Cir. 1965).

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Golden and directed by the Family Court in fulfillment
(3)

of that obligation. These were all interlaced to assure that that obligation would be observed. All were founded upon petitioner's duty of maintenance and support. Petitioner would fragmentize the Family Court's order and have this Court decide which payments were in fact essential for respondent's support and which, by their contingent and cumulative nature, were not essential. However, not every debt "for alimony . . . maintenance or support" within the meaning of section 17 of the Bankruptcy Act must fit petitioner's restrictive formulation. The essential purpose of the obligation must be considered. Courts have held that payments due under the provisions of separation agreements that defer certain installments until after the death of the wife may nevertheless be nondischargeable.
(4)

The test, in short, is not the actual use to which the money would have been put had the bankrupt

(3) Cf. In re Abrams, 25 F.2d 640 (2d Cir. 1928) (L. Hand, J.): "[T]he sum of all the payments . . . was to be paid and accepted in full for that support and maintenance only which could be exacted by recourse to law."

(4) In re Adams, 25 F.2d 640, 642 (2d Cir. 1928) (dictum). Cf. D'Andria v. Hageman, 253 App. Div. 518, 2 N.Y.S.2d 832, 835-36 (1st Dep't), aff'd mem., 278 N.Y. 630 (1938); Krupp v. Felter, 77 N.Y.S.2d 665, 667 (Sup. Ct.), aff'd mem., 80 N.Y.S.2d 725 (1st Dep't 1948).

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lived up to his matrimonial obligation, but whether the debt was incurred or its payment directed in discharge of that obligation. (5)

In the original agreement the wife was to receive \$35 per week alimony, which petitioner failed to pay and as a result of which he was held in contempt and ordered arrested. In the second agreement respondent yielded the enforcement and contempt powers of the Family Court to compel petitioner's compliance with his obligation to support her; she also waived the \$35 per week alimony in the future but only so long as the bankrupt kept current in his payments of the past arrears. The petitioner agreed and the Family Court directed that in the event he failed to do so his obligation to pay the previously fixed alimony was revived and he was to pay \$5 per day additional during the default period. It was within the court's power, which it exercised in this instance, to direct variable rather than constant fixed payments, depending upon the circumstances. The increased payments

(5) In re Ridder, 79 F.2d 524 (2d Cir. 1935), cert. denied, 297 U.S. 721 (1936); In re Adams, 25 F.2d 640 (2d Cir. 1928); In re Baldwin, 250 F. Supp. 533 (D. Neb. 1966); D'Andria v. Hageman, 253 App. Div. 518, 2 N.Y.S.2d 832, 835-36 (1st Dep't 1938); Krupp v. Folter, 77 N.Y.S.2d 665, 667 (Sup. Ct. 1948).

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 were based upon and derived from petitioner's marital
 duty of support. The wife's forbearance in accepting a
 lesser sum if petitioner lived up to his commitments did
 not destroy the basic nature of the obligations which
 were revived upon petitioner's default. The wife did not
 relinquish her right to nondischargeable alimony or main-
 tenance and support because she was willing to forego a
 portion of it if petitioner was current on payment due.

The debts are for "alimony . . . maintenance or
 support" and it does not matter whether they are described
 as "revived alimony," "incentives" or "penalties." While
 this Court has the power to look behind the Family Court
 judgment and examine the nature of the underlying debt to
 determine dischargeability,⁽⁶⁾ it cannot ignore the agree-
 ment of the parties themselves and adopted by the Court
 that the so-called "penalty" provisions were an interlaced
 part of the petitioner's marital obligation. Moreover,
 the agreement's incorporation in the 1968 decree of the
 Family Court, with the specific direction for its compliance,
 necessarily carried with it the judicial determination that

(6) *Wetmore v. Markoe*, 196 U.S. 68, 72 (1904). *Cf.* *Popper v. Litton*, 308 U.S. 295 (1939).

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 the contract as a whole "constitute[d] such suitable
 provision for wife and chil[d] 'as justice requires
" (7) In sum, upon this record the Court con-
 cludes that the debts at issue were incurred for "alimony
 . . . maintenance or support," and are nondischargeable. (8)

The order of the Bankruptcy Judge is affirmed
 in all respects.

Dated: New York, N. Y.
 February 25, 1976

EDWARD WEINFELD
 United States District Judge

(7) *Goldman v. Goldman*, 282 N.Y. 296, 302 (1940).

(8) Petitioner's suggestion that the Family Court was with-
 out jurisdiction to award the judgment at issue here is
 without merit. In granting the judgment the Family Court
 was not entering a new support order but enforcing the
 terms of its previous decree. The judgment was based on
 currently effective support or alimony provisions. See
Silver v. Silver, 36 N.Y.2d 324, 367 N.Y.S.2d 777 (1975).

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK -- --X

In the Matter

of

ROBERT K. GOLDEN,

Bankrupt.

ROBERT K. GOLDEN,

Plaintiff-Appellant,

-against-

RENFE GOLDEN,

Defendant-Appellee.

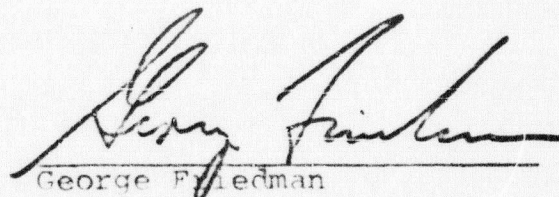
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In Bankruptcy
No. 74-R-1881

NOTICE OF APPEAL

NOTICE is hereby given that ROBERT K. GOLDEN, the Bankrupt herein, hereby appeals to the United States Court of Appeals for the Second Circuit from the Opinion-Order entered in this proceeding on February 26, 1976 affirming an order of the Bankruptcy Judge dated June 3, 1975 dismissing the bankrupt's complaint.

Dated: New York, N.Y.
March 4, 1976



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Murray Hill 5-1264

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Services of three (3) copies of:

the within is

hereby acknowledged 26 day

of April, 1976

Bellbuck & Black

Attorney for